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POTENTIAL RECIPROCITY AND THE CONGLOMERATE MERGER: CONSOLIDATED FOODS REVISITED

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INTRODUCTION

"IN 1959, comfortably en route to Richmond, Virginia, Paul L. Davies, chairman and chief executive of the big conglomerate, Food Machinery and Chemical Corp. (FMC), was both satisfied and expectant. His company's machinery division had just received a $35 million contract from the Defense Department for armored aluminum personnel carriers. Davies was on his way to place with Reynolds Metals, at the time troubled by excess capacity, an order for tons of aluminum plate.

"But Davies was going not only as a potential buyer. FMC's chemical division is a large producer of soda ash and caustic, which are used in the making of alumina. Davies was therefore looking forward to a mutually beneficial agreement, in which he would place a large order for aluminum and would book in return an order for the sale of substantial amounts of soda ash and caustic.

"On his arrival, Davies received a rude shock. Richard Reynolds told him that the company had already made provision for its soda-ash requirements. After dwelling on the size and importance of the order he had to place, Davies returned to New York. He indicated that he would be awaiting some further response from Reynolds before he settled on how he would parcel out his aluminum order among the major producers.

"As he guessed he would, Davies soon got the word he wanted. Reynolds made some changes in its soda-ash arrangements. FMC could sell Reynolds quite a bit of it, after all."[1]

Mr. Davies might be surprised to know that he would fit the description of one of those "underling tradesmen" that Adam Smith was berating when he said: "It is the most underling tradesmen only who make it a rule to employ chiefly their own customers. A great trader purchases his goods always where they are cheapest and best, without regard to any little interest of this kind."[2] This cudgel, raised back in 1776 by Smith against what is today a very common business practice among the "great traders" of American industry, has quite recently been taken up again by the antitrust enforcement agencies. However, the fact that this practice, known as "reciprocity," has only lately come under increasing attack by the Federal Trade Commission and the Antitrust Division of the Department of Justice as an antitrust violation does not imply that it

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1. McCreary & Guzzardi, *A Customer is a Company's Best Friend,* Fortune, June 1965, 180, at 181.

2. A. Smith, The Wealth of Nations 460 (Mod. Lib. ed. 1937).

is new. It has been dated as far back as the Phoenician traders.[3] The *Wall Street Journal* has gone further and suggests that reciprocity is as old as business itself.[4] Regardless of its origin, there are indications that it has become a very useful selling tool at every level of business, from the giant corporations down to the corner grocer. In 1960, FMC executives claimed that during the previous five years reciprocity had helped to increase its chemical division's sales about $6 million—some fifteen percent—and that about fifty percent of FMC's total 1958 sales were tied to reciprocal arrangements. "Buying from those who buy from us gives the corporation the greatest benefit on major contracts."[5] And it is a natural human reaction for the corner grocer to have his teeth repaired by the dentist who buys his groceries at his store.

RECIPROCITY

Reciprocal dealing simply means, "If I patronize him, he will patronize me," or, to express it in terms of its most common manifestation, "I will buy from you, if you will buy from me." A more complex form of reciprocity, referred to as "secondary reciprocity,"[6] occurs where *A* buys from *B* because *C*, who buys from *A*, sells to *B*.[7]

The practice of reciprocity can be either tacit or overt, or, as defined by one commentator, "psychological" or "coercive."[8] Overt or coercive reciprocity refers to explicit threats and promises designed to induce purchases by the supplier; tacit or psychological reciprocity results from the inherent power of a large customer, solely by virtue of the volume of his purchases, to influence the purchases of his suppliers. Tacit reciprocity is said to be due to a "predilection of businessmen for an easy sale and the propensity to show gratitude to those who have favored a seller with orders."[9] It has been observed that business reciprocity may significantly affect purchasing decisions even in the absence of any overt coercion, and even, at times, without any explicit reference by either party to the anticipated advantages of reciprocal purchases.[10]

Reciprocal buying is not the only form business reciprocity may take. In general, the practice includes any type of mutual concession made by inde-

3. Address by George Miron, Assistant Chief, General Litigation Section, Antitrust Division, Department of Justice, Trade Relations Association Meeting, Sept. 18, 1963, at 1.

4. *Swapping Business*, Wall Street Journal, Dec. 4, 1963, at 1 col. 6.

5. Chemical Week, June 3, 1961, at 70.

6. Krash, *The Legality of Reciprocity under Section 7 of the Clayton Act*, 9 Antitrust Bull. 93, 97 (1964); Ammer, *Realistic Reciprocity*, Harv. Bus. Rev., Jan.-Feb. 1962, 116, 119.

7. *See*, United States v. Ingersoll-Rand, 218 F. Supp. 530 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963).

8. Krash, *supra* note 6, at 99.

9. Handler, *Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures*, 49 Va. L. Rev. 433, 435 (1963).

10. Ammer, *supra* note 6, at 121; Hausman, *Reciprocal Dealing and the Antitrust Laws*, 77 Harv. L. Rev. 873, at 875, 877 (1964); Stocking & Mueller, *Business Reciprocity and the Size of Firms*, 30 J. Bus. U. Chi. 73, 91-92 (1957).

pendent firms to promote their business interests. This would include such things as the reciprocal exchange of technology, the joint sharing of transportation facilites, or the joint development of sources of raw material.[11] However, the scope of the present discussion will be restricted principally to reciprocal buying practices.

TRADE RELATIONS

While it may be difficult to accept the results of one survey that reciprocity involved as much as twenty percent of the sales volume of the country in 1963,[12] a concrete manifestation attesting to its widespread use has recently emerged on the business scene. Today several large, diversified firms have special departments, called "Trade Relations" or "Customer Relations,"[13] whose general function is to supply the sales department with data on their own company's purchases from each supplier to be used as a tool in persuading suppliers to become customers. In 1965, about sixty percent of the companies on *Fortune's* 500 list had "trade relations men" who adroitly, and more or less openly, conducted reciprocal affairs.[14] Some of these have even gone so far as to form a trade association, called the Trade Relations Association, which as of the end of 1963 had 113 members[15] and had grown to 141 by 1965.[16]

The function of a trade relations man has been variously described. The TR man of the U.S. Rubber Company defined it as "the means of dealing with reciprocal possibilities through a process of valid management methods to sift and consolidate total company resources and the use of purchasing, traffic, financial affiliations, executive and board contacts, and all legitimate assets in support of total sales and profits."[17] Another said, "We are morally obligated to consider those people who have befriended us in the matter of purchases. Conversely, we feel it just as important to emphasize the fact that when we need help we should feel free to call upon our commercial friends to help us in the matter of sales, just as we have helped them."[18] On the other hand, the presidential assistant in charge of reciprocity for the former Liquid Carbonic Division of General Dynamics Corporation recently said, "Let's not kid our-

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11. *See* Edwards, *Conglomerate Bigness as a Source of Power,* in Business Concentration and Price Policy, 342-43 (1955).
12. *See supra* note 4.
13. Other names used to describe the trade relations function are Corporate Sales, National Sales, Trade Analysis, Customer and Supplier Relations, Corporate Relations, and National Accounts: Willison, *Creating Commercial Friendships Through Trade Relations,* Address to the Chemical Buyers Group of the Nat'l Ass'n of Purchasing Agents at Chicago, Ill., Oct. 27, 1960, at 1. Mr. Willison was Director, Trade Relations, Jones & Laughlin Steel Corp.
14. McCreary & Guzzardi, *supra* note 1, at 180.
15. *See supra* note 4.
16. McCreary & Guzzardi, *supra* note 1, at 194.
17. Meade, *The Trade Relations Function in Modern Business,* in Am. Management Ass'n, Management Bull. No. 19: Trade Relations Defined 1, 4 (1962).
18. *See* Willison, *supra* note 13, at 3.

selves, the ultimate reason for establishing a trade relations department is to increase sales through the proper application of your purchasing power."[19]

All TR men like to emphasize that reciprocity is necessarily only one element in a business arrangement and can never override the traditional sales criteria of price, quality and service. They point out that they always prefix their pitch with an essential phrase: "All things being equal [meaning price, quality, and service], we want to be considered." An equitable hearing for their company is regarded as their most important objective.[20]

However, the protestations of legitimacy and good faith by the practitioners of this art of "corporate friendly persuasion" have failed to cast off the somewhat hazy, ethical stigma[21] attached to it by Adam Smith; but, more notably, they have now incurred the wrath of the federal antitrusters.

Reciprocity has, to some extent, been attacked under three antitrust statutes—the Sherman Act, the Federal Trade Commission Act, and the Clayton Act.

THE SHERMAN ACT

A. *Section One*[22]

The only reciprocity case to date wherein the court found a violation of section 1 (as well as a violation of section 7 of the Clayton Act) is *United States v. General Dynamics Corp.*,[23] in which Dynamics' 1957 acquisition of Liquid Carbonic Corporation was struck down. This merger had combined one of the nation's twenty largest industrial enterprises (Dynamics) and the leader in the carbon dioxide industry (Liquid Carbonic), allowing General Dynamics to use its tremendous purchasing power (about $½ billion in 1957) to coerce its many suppliers who used carbon dioxide to buy their requirements from their Liquid Carbonic Division.

After holding that reciprocity, whether coercive in nature or based on mutual patronage, is an anticompetitive practice, the court found that both parties to the merger fully intended to attempt to foreclose competition by the use of reciprocity. Pursuant to this intent, they instituted a highly systematized plan of attack called the "Special Sales Program" and described by one officer of the defendant corporation as the "dynamite that can blow competition out of the picture."[24]

19. *See* United States v. General Dynamics Corp., 258 F. Supp. 36, 43 (S.D.N.Y. 1966).
20. McCreary & Guzzardi, *supra* note 1, at 192.
21. Ammer, *supra* note 6, at 120.
22. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ." 26 Stat. 209 (1890), *as amended,* 15 U.S.C. § 1 (1964).
23. 246 F. Supp. 156 (1965) (denial of defendant's motion to dismiss), *and* 258 F. Supp. 36 (S.D.N.Y. 1966). Reciprocal dealing was one of the allegations in United States v. E.I. du Pont de Nemours & Co., 126 F. Supp. 235 (N.D. Ill. 1954), *rev'd,* 355 U.S. 586 (1957), in which the complaint charged violations of sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. The district court found that the allegations were not proved, and the Supreme Court reversed solely on the basis of section 7 of the Clayton Act.
24. 258 F. Supp. 36, 48-49.

Applying the provisions of the Sherman Act to this case, the court analogized reciprocity to "tying-in" agreements, which the Supreme Court has held to be a "per se" violation of section 1 if a "not insubstantial" amount of commerce is effected.[25] Here, General Dynamics, via the Special Sales Program, "tied" its purchases from a present or prospective vendor to that vendor's purchases of carbon dioxide from Liquid Carbonic. However, it was held that the total amount of proven restrained trade due to actual bilateral agreements between General Dynamics and its suppliers was too inconsequential to warrant a finding of a contract, combination, or conspiracy in restraint of trade. But the court went on to find that, in view of the bilateral intent at the time of the acquisition to employ the anticompetive device of reciprocity to generate sales and the "not insubstantial" amount of commerce effected, the merger itself was violative of section one. At the time of the merger, Liquid Carbonic controlled approximately thirty-five percent of the carbon dioxide market and the court found a probability that a minimum of a further five percent would be added to that market share if the Special Sales Program were permitted to continue in operation.[26] Following the *Philadelphia National Bank* direction that even slight increases in concentration should be prevented where the industry is already unduly concentrated,[27] the court held that a five percent, probable foreclosure of competition in the instant case was a "not insubstantial" amount of commerce.

Thus, if a merger in an already concentrated industry creates an opportunity for reciprocity dealing over even a relatively small segment of the market and, at the time of the merger, the parties intend to take advantage of the reciprocity potential, the merger violates section 1 of the Sherman Act. The test of a "not insubstantial" amount of commerce apparently depends on the level of market concentration existing prior to the merger—the higher that level is, the more suspect a given amount of market foreclosure becomes.

B. *Section Two*[28]

In *United States v. Griffith,* the Supreme Court said:

> Large scale buying is not, of course, unlawful per se. It may yield price or other lawful advantages to the buyer. It may not, however, be used to monopolize or to attempt to monopolize interstate trade or commerce. Nor . . . may it be used to stifle competition by denying competitors less favorably situated access to the market.[29]

This statement points out that either monopolizing or attemping to monopolize

25. Times Picayune Publ. Co. v. United States, 345 U.S. 594 (1953); International Salt v. United States, 332 U.S. 392 (1947).
26. United States v. General Dynamics Corp., 258 F. Supp. 36, 64-65 (S.D.N.Y. 1966).
27. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 364 (1963).
28. "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (1953).
29. 334 U.S. 100, 108 (1948).

may constitute a violation of section 2, and appears to indicate that, while actual monopoly power created by reciprocity could be a clear violation of section 2 in view of the definition of such power as the ability to "control prices or exclude competition,"[30] a reciprocal buying program may constitute an attempt to monopolize, even when the firm has less than monopoly power over the market. Reciprocal practices can be evidence of the intent, necessary to establish such an attempt.[31]

Section 2 case law concerning reciprocal trading is conspicuous by its absence. However, the Government recently charged General Motors with using reciprocity methods to monopolize the locomotive industry.[32]

Between the time of its entry in 1930 and 1960, General Motors had increased its market share of the locomotive industry in the United States to eighty-four percent and it was claimed that reciprocal buying had contributed to this monopoly control. The Department of Justice charged, in part:

> General Motors has exercised the monopoly power which it unlawfully acquired and maintains in the following ways, among others:
> (a) by routing its freight traffic so as to remove or reduce the freight traffic shipped over the lines of railroads which purchased all or a substantial part of their railroad locomotives from General Motor's competitors with the purpose or effect of inducing purchases of railroad locomotives from General Motors.
> (b) By giving preference in routing traffic to railroads which purchase General Motors' railroad locomotives with the purpose or effect of inducing purchases of railroad locomotives from General Motors.
> (c) By using, discussing or referring to General Motors' freight shipments when attempting to sell railroad locomotives with the purpose or effect of inducing actual or potential customers to purchase all or a large portion of their railroad locomotives from General Motors.[33]

Although this action has not been pursued in the courts, it serves to illustrate that reciprocity pressure could, in certain instances, reach criminal proportions where it is systematically applied to monopolize, or attempt to monopolize, an industry by the foreclosure of competitors.

Presumably, these instances, should they arise, will involve relatively large, diversified companies which, because of their size and purchasing power, possess substantial leverage over their smaller suppliers. Generally, the big company, constituting in itself an important market for a great many products, will be much more important to its suppliers than vice versa and, as a result, can more

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30. United States v. E.I. du Pont de Nemours Co., 351 U.S. 377, 391 (1956) (cellophane case).
31. Goldstein, *Reciprocity—Antitrust Violation by Natural Reaction*, 32 Geo. Wash. L. Rev. 832, 847-48 (1964).
32. United States v. General Motors Corp., Civil No. 63-80, N.D. Ill., Jan. 14, 1963, 5 Trade Reg. Rep. P. 45663 (case 1733), *and* Criminal No. 61-356, S.D.N.Y., indictment of April 12, 1961, 5 Trade Reg. Rep. P. 45061 (case 1605), *transferred to* N.D. Ill., June 7, 1961, 194 F. Supp. 754.
33. *Id.*

effectively coerce reciprocal dealings. If G.M. says, "If you scratch my back, I'll scratch yours," there will be numerous little hands anxious to relieve the itch on G.M.'s corpulent back. On the other hand, the small firm lacks sufficient market power to enable it to dictate to others.

In any event, it is certain that, in view of the increasing attention being paid to the expansion of trade relations by the Justice Department, TR men, especially those of the larger companies, will proceed warily in the future, lest the dubious moral tone now attached to their methods by some businessmen (particularly those left out in the cold by reciprocal arrangements) should develop into full-blown criminality.

THE FEDERAL TRADE COMMISSION ACT

A. *Section Five*[34]

During the 1930's, the FTC decided in three cases that overt and coercive reciprocity was an unfair method of competition in violation of section 5 of the Federal Trade Commission Act. In the first of these, *Matter of Waugh Equip. Co.*,[35] executives of Armour & Co., the large meat packing firm, acquired stock in the Waugh Co., a manufacturer of gears for railroad cars, and proceeded to use Armour's vast power as a major rail shipper to induce railroad companies to buy their gears from Waugh. They offered to increase Armour's shipments by carriers who bought gears from Waugh and threatened to cut off carriers who did not. Although Waugh was a very minor producer with less than one percent of the gear market in 1924 when the reciprocity campaign began, it had achieved industry leadership by 1930 with thirty-five percent of total industry sales.[36]

In finding a violation of section 5, the Commission pointed out that other gear manufacturers made their sales presentations to the mechanical, operating, and purchasing departments of the railroads, rather than to their traffic departments, and that the factors ordinarily considered by the railroads were price, quality, and salesmanship. It was further found that the efforts of the Armour officials on Waugh's behalf sometimes resulted in sales to railroads against the advice of their technical personnel and in disregard of the bids of competitors. Those competitors, having no appreciable traffic to offer the railroads, were unable to compete with Waugh on an equal footing.

The Commission concluded that Waugh and the Armour officials had "taken advantage of a competitive weapon, oppressive and coercive in nature," which tended unduly to suppress competition by preventing customers "from

34. "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 38 Stat. 719 (1914), *as amended*, 15 U.S.C. § 45 (1964).
35. 15 F.T.C. 232 (1931).
36. *Id.* at 242.

exercising their free will and judgment in determining which device is the most efficient and will best serve their needs at the lowest net cost over a period of time."[37] Waugh had "thus injected an element in the competitive field" which was "unfair and abnormal" and tended "to reduce the efficiency and economy in the production and sales methods of competing manufacturers and [give] to the concern that [controlled] the largest volume of freight traffic an unfair advantage that [would] more than offset the higher efficiency in the production and sales methods of competing concerns which [controlled] no such traffic."[38] A cease and desist order was issued.

A similar case with the same result as that in *Waugh* was decided the following year. In *Mechanical Mfg. Co.*,[39] important employees of the large packer, Swift & Co., along with the Swift estate and members of the Swift family, controlled Mechanical Manufacturing Co., a manufacturer of railroad equipment. As in the *Waugh* case, railroads were persuaded to buy Mechanical's products by promises of future Swift & Co. business and threats of withdrawal of existing business. In fact, traffic was actually diverted from railroads that failed to comply to those that did. The FTC ruled that the practice gave Mechanical an unfair advantage and was violative of the Federal Trade Commission Act.

In 1937, reciprocity was again the basis of the complaint in *California Packing Corp.*[40] California Packing, a large, diversified food processor and distributor, sought to promote one of its subsidiaries, Encinal Terminals Corp., a corporation operating wharves, sheds, warehouses, and switch tracks on San Francisco Bay for the purpose of handling rail and steamship freight at the waterfront. By promising, or threatening, to shift their purchases of raw and manufactured materials, California Packing had induced their suppliers to use Encinal at the expense of other terminal companies.

The Commission found that the "principal consideration" for California Packing's purchases from its suppliers became "the volume of tonnage routed by said industrial concerns through the said Encinal Terminals . . . instead of the usual and normal competitive considerations such as quality, service, and price . . . . "[41] This was held an unfair method of competition and California Packing and its subsidiaries were ordered to cease and desist.

It is clear from the above cases that reciprocity can be an unfair method of competition. But all three decisions stress the coercive nature of the weapon and it is doubtful that section 5 can reach tacit or psychological reciprocal dealing in which no threat or suggestion is made, or even intended in some cases.[42]

37. *Id.* at 246, 247.
38. *Id.* at 247.
39. 16 F.T.C. 67 (1932).
40. 25 F.T.C. 379 (1937).
41. *Id.* at 398-99.
42. *See* Hausman, *supra* note 10, at 885.

THE CLAYTON ACT

A. *Section Seven*[43]

The current attack on business reciprocity has come under the anti-merger section of the Clayton Act and coincides with the current movement of the government and the Supreme Court against conglomerate mergers or diversification by acquisition.[44]

Conglomerate mergers have been defined as "all acquisitions other than (1) acquisition by a producer of the stock or assets of a firm producing an identical product or close substitute and selling it in the same geographical market—the simple horizontal merger; and (2) acquisition of the stock or assets of a firm that buys the product sold by the acquirer or sells a product bought by the acquirer—the simple vertical merger."[45] This term covers the extension of a product line into a new geographical territory as well as expansion into new product lines and includes acquisitions in which there are no discernible economic relationships between the businesses of the merging companies and those that "fit" the operations of the acquirer in some tangible respect. Those that "fit" occur most frequently because companies intending to expand will tend to look to those fields with which they have some degree of familiarity, and where economies and efficiencies through the use of the same production facilities, the same distribution channels, or the same research and development efforts are possible.[46]

Although some commentators have argued the contrary,[47] it is now well settled that the 1950 amendment of section 7 of the Clayton Act applies to conglomerate mergers. Chief Justice Warren, relying on the obvious intent of Congress when the section was amended,[48] concluded in the *Brown Shoe* case that

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43. No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

38 Stat. 731 (1914), *as amended,* 15 U.S.C. § 18 (1964).

44. The Federal Trade Commission has said that "there are few greater dangers to small business than the continued growth of the conglomerate corporation." FTC, The Merger Movement: A Summary Report 59 (1948).

45. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 Harv. L. Rev. 1313, 1315 (1965).

46. *Id.*

47. We have made no recommendations concerning "conglomerate" mergers and we are inclined to make none . . . . In view of the comparatively stringent ban on vertical or horizontal acquisitions by firms with market power, it would seem a reasonable concession to the advantages of mergers as entry-facilitating devices, and to the importance of a strong market for assets, to permit conglomerate acquisitions for everyone, perhaps barring some extreme cases where adverse effects are obvious or the concentration of wealth is huge, *e.g.,* AT & T and U.S. Steel.

Kaysen & Turner, Antitrust Policy 134-35 (1959).

48. "[T]he bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition . . . . or tending to create a monopoly." H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).

"section 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers. . . . "[49] However, there being neither a competitive nor a buyer-seller relationship between the acquiring and acquired firms, the tests and standards being applied to block horizontal and vertical mergers were seen to be inapplicable to conglomerates. And because this type of acquisition has become the most common form of merger today,[50] the government and the courts, in their stand against further concentration of American industry, have lately been faced with the problem of developing legal standards for testing the legality of conglomerate mergers.

It is hardly surprising that the reciprocity doctrine should have reappeared on the anti-concentration-of-industry-through-merger battleground when it is realized that a conglomerate merger increases the opportunity for reciprocity dealing. It is obvious that a large diversified company can more readily employ reciprocity than a single-line firm because "a firm which produces a variety of products is more likely to find a supplier who is also a potential buyer of one or more of these products than a firm which produces only one."[51] And as economists Stocking and Mueller observed:

> Diversification not only increases the number of opportunities for reciprocal buying; it increases their magnitude. A single-line producer, even though a near monopolist, may buy so little of some material that reciprocal buying has little influence on suppliers as potential customers. But by diversifying—making other products requiring the same input—a firm may so enlarge its buying as to give it the power to increases it sales. Practically all of a giant diversified firm's purchases of goods and services may achieve importance as a means of increasing sales.[52]

Thus, the larger the purchase, the more likely it is to induce a purchase in return; the more products available, the more likely it is that the supplier will find one to suit his needs. A conglomerate merger both increases size and extends the product-line, thereby enhancing the area of potential reciprocity. It is for this reason that attacks on reciprocity have been concentrated in the field of conglomerate mergers.[53]

Reciprocity was charged in the recent *Penn-Olin* case at the District Court level[54] but it was held there, inter alia, that the government had failed to show

49. Brown Shoe Co. v. United States, 320 U.S. 294, 317 (1962).
50. One estimate puts them at 70% of the total number of mergers. Barber, *The New Partnership, Big Government and Big Business,* The New Republic, Aug. 13, 1966 at 18.
51. Note, *The Consolidated Foods Case: A New Section 7 Test for the Conglomerate Merger,* 49 Va. L. Rev. 852, at 866-67 (1963).
52. Stocking & Mueller, *Business Reciprocity and the Size of Firms,* 30 J. Bus. U. Chi. 73 (1957), reprinted in Stocking, Workable Competition and Antitrust Policy 287, 292 (1961).
53. Goldstein, *supra* note 31, at 840.
54. United States v. Penn-Olin Chemical Co., 217 F. Supp. 110 (D. Del. 1963). On appeal to the Supreme Court, 378 U.S. 158 (1964), the case was returned to the District Court for further findings on the issue of the elimination of potential competition. *See* 246 F. Supp. 917 (D. Del. 1965).

a probable, substantial lessening of competition in the relevant market as a result of reciprocity arrangements.

Pennsalt Chemicals Corporation and Olin Mathieson Chemical Corporation jointly formed Penn-Olin Chemical Company in 1960 to produce and sell sodium chlorate in the southeastern United States. To the Government's charge that an immediate effect of the joint venture would be to make Olin a captive buyer of sodium chlorate from Penn-Olin, thus preventing other suppliers from obtaining any of Olin's business, the court answered:

> While Olin's 50% ownership of Penn-Olin does not legally deprive Olin of the right to continue to buy from (Penn-Olin's competitors), self-interest might lead Olin to buy from Penn-Olin. But it cannot be said that as a matter of reasonable probability Olin will do so. Whether purchasing from Penn-Olin will be to Olin's *net* advantage depends upon a balancing of the advantage which will accrue to Olin as a stockholder of Penn-Olin as against freight and service disadvantages inherent in shipments from Calvert City instead of a "next-door" supplier. The record gives no indication how Olin will evaluate these conflicting considerations.[55]

The Government further argued that the pooling of their financial resources by the joint venturers would greatly enhance their combined purchasing power, which could be used as a basis for making reciprocal arrangements with vendors who are also sodium chlorate buyers, thus giving Penn-Olin an undue sales advantage over its competitors. The court admitted that Pennsalt was an "acknowledged practitioner of reciprocity" but was unable to find on the evidence that, even if Penn-Olin attempted to capitalize on its buying power to further its sales position, as a matter of reasonable probability it would ultimately dominate the sodium chlorate market. "The Government's forecast that Penn-Olin will . . . ultimately become the dominant factor in the southeast is based on conjecture and nothing more."[56]

Thus, the Delaware court, while acknowledging that reciprocity could be an anticompetitive practice and that a merger in certain circumstances could open the door to its utilization, was not prepared to make the mere opportunity for reciprocity in itself a violation of section 7. Even overt attempts to employ reciprocity as a sales tool were held to be insufficient unless accompanied by a probable, substantial lessening of competition. The court properly adhered to the section 7 test of a reasonable *probability* of a *substantial* lessening of competition. Mere possibility or conjecture is not enough. If it were, any conglomerate merger would be illegal, as "there are probably very few industrial mergers of any size which do not open up some theoretical opportunities to practice reciprocity."[57] However, shortly after the Penn-Olin decision was handed down,

55. *Id.* at 125-26.
56. *Id.* at 126.
57. Harsha, *The Conglomerate Merger and Reciprocity—Condemned by Conjecture?*, 9 Antitrust Bull. 201, 204 (1964).

another district court took a significant step in the direction of making mergers which create the opportunity for reciprocal dealing, without more, illegal per se.

In *United States v. Ingersoll-Rand Company*,[58] the country's fourth largest manufacturer of general industrial machinery was enjoined from acquiring three companies which manufactured coal mining machinery. The court of appeals, affirming the district court, stated:

> Ingersoll-Rand is a large purchaser of steel and the steel industry constitutes one of the largest present markets for coal . . . . It is not overly speculative to assume that the judicious use of its steel-purchasing power by Ingersoll-Rand could immeasurably increase the sales by the acquired companies of machinery and equipment to the coal mining companies which acutely need the continued good will of the steel industry. Moreover, *the mere existence of this purchasing power* might make its conscious employment toward this end unnecessary; *the possession of the power is frequently sufficient*, as sophisticated businessmen are quick to see the advantages in securing the good will of the possessor. Certainly the steel producer who seeks orders from Ingersoll-Rand may tend to prefer the acquired companies as the source of supply of equipment used in his "captive" mines and the advantages accruing to him from so favoring the acquired companies would not have to be pointed out by Ingersoll-Rand. What *may* here be involved is the trade practice known as "Reciprocity." This is particularly destructive of competition because it transforms substantial buying power into a weapon for denying competitors less favorably situated access to the market.[59]

This language would seem to indicate that the possibility of a large firm using reciprocity pressure and suasion is sufficiently anticompetitive in itself to bring a merger which creates such a possibility within the proscription of section 7.

B. *The Consolidated Foods Case*

The most extensive treatment of the issue of reciprocity in business dealings as it relates to corporate mergers came in the recent *Consolidated Foods* case.[60]

In 1951, Consolidated, a large, diversified processor, wholesaler and retailer of food products acquired Gentry, Inc., one of the two leading producers of dehydrated onion and garlic. In 1950, immediately prior to the Consolidated-Gentry merger, Gentry accounted for twenty-eight percent of dried onion sales and Basic Vegetables Products Inc., its principal competitor, 60 percent. By 1958, these figures were thirty-five percent and fifty-seven percent, respectively.

58. 218 F. Supp. 530 (W.D. Pa.); *aff'd*, 320 F.2d 509 (3d Cir. 1963).

59. 320 F.2d 509, 524 (3d Cir. 1963), *aff'g*, 218 F. Supp. 530, 552 (W.D. Pa.) (Emphasis added.). The idea that Ingersoll-Rand could impair competition in the coal mining machinery industry by inducing the steel companies to persuade their coal suppliers to buy their machinery needs from Ingersoll is referred to as "secondary reciprocity." *See* text accompanying *supra* notes 5-7.

60. FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965), *rev'g*, 329 F.2d 623 (7th Cir. 1963), *rev'g*, 3 Trade Reg. Rep. (1961-63 Transfer Binder) 16182 (1962).

In dehydrated garlic sales, Gentry had fifty-one percent of the market in 1950 and thirty-nine percent in 1958, while Basic's shares were thirty-five percent for the same years.

Nearly seven years after its consummation, the merger was challenged by the FTC[61] as a violation of section 7 of the Clayton Act and struck down because it gave Gentry "a new and anticompetitive advantage, the mixed threat and lure of reciprocal buying, which was not available to its competitors and would tend to foreclose them from a substantial market, and which promised to further rigidify an already concentrated industry and to discourage new entrants."[62]

Commissioner Elman reasoned that reciprocity is necessarily anticompetitive:

> It distorts the focus of the trader by interposing between him and the traditional competitive factors of price, quality, and service an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit.
> ... In this situation, it is the relative size and conglomeration of business rivals, rather than economic efficiency, that may determine firm growth and success, and, ultimately the allocation of resources. . . . And it is clear that these anticompetitive effects are likely to occur, given a corporate structure similar to that of (Consolidated) . . . .[63]

Also, by drawing an analogy between reciprocal buying and tying agreements, *i.e.*, agreements by one party to sell a product to another only on condition that the buyer also purchase a different product,[64] the Commission left no doubt that they believe reciprocity, like the tie-in contract, should be *per se* illegal.

In reaching their decision, they emphasized the structure of the dried onion and garlic industry and observed that "Section 7 is designed . . . to 'nip in the bud' such changes in the structure of an industry, produced by corporate acquisitions, as are likely to bring about substantial lessening of competition . . . . [I]n a Section 7 case . . . the inquiry does not focus on overt anticompetitive trade practices as such, but rather on changes in market or industry structure that are effected by the challenged merger and that may have anticompetitive consequences."[65] Since Consolidated, as a result of the merger, became a seller of dehydrated onion and garlic and was also a purchaser from food processors who used those ingredients in their products, the Commission concluded that the merger presented it with an opportunity to make sales in

61. The complaint issued Dec. 18, 1957.
62. FTC v. Consolidated Foods Corp., 3 Trade Reg. Rep. (1961-63 Transfer Binder) 16182 (1962), *rev'd*, 329 F.2d 623 (7th Cir. 1963), *rev'd*, 380 U.S. 592 (1965).
63. *Id.*
64. *See* International Bus. Mach. Corp. v. United States, 298 U.S. 131 (1936); International Salt Co. v. United States, 332 U.S. 392 (1947); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).
65. FTC v. Consolidated Foods Corp., 3 Trade Reg. Rep. (1961-63 Transfer Binder) 16182 (1962), *rev'd*, 329 F.2d 623 (7th Cir. 1963), *rev'd*, 380 U.S. 592 (1965).

one product market "on the sheer strength of its buyer power in other markets"[66] and thus posed a "real and substantial" threat to competition.[67]

On the question of substantiality, the Commission was satisfied with the finding that a minimum of twenty-five percent of the onion and garlic market could be affected by the acquisition since, in 1958, producers that both supplied Consolidated and bought from Gentry accounted for at least one-fourth of the entire industry's output. Add to this figure many other prospective suppliers of Consolidated who might also have bought from Gentry and "the latent force of Consolidated's buying power therefore undoubtedly exceeds one-fourth of both markets by a substantial margin. The area of prospective market foreclosure is thus not merely significant, but exceptionally large."[68]

Thus, providing the test of substantiality can be met (which is not too difficult in view of the recent *Von's Grocery*[69] decision), the FTC appears ready to condemn any merger which creates a potential for reciprocity.

However, on appeal, the Seventh Circuit was persuaded by post-acquisition evidence that the Commission had failed to show a probability that the merger would substantially lessen competition. Judge Castle said:

> Undoubtedly there are situations resulting from acquisitions or mergers in which business reciprocity has the effect of substantially lessening competition or can be so utilized . . . .
>
> [But] here ten years of post-acquisition experience—during which Consolidated attempted overt enforcement of reciprocal buying practice where it deemed it might be successful—serves to demonstrate that neither the acquisition of Gentry, in and of itself, nor the overt attempts to use buying power to influence sellers to Consolidated to purchase from Gentry resulted in substantial impact on the relevant market occurred, and absent some factor which requires a different approach we are of the view that the experience reflected by this post-acquisition period must weigh heavily in appraising future probabilities.[70]

The Supreme Court, unanimously reversing the court of appeals, conceded that post-acquisition evidence was entitled to some consideration but was unwilling to give it as much weight as was the lower court. After holding "at the outset that the 'reciprocity' made possible by such an acquisition is one of the congeries of anticompetitive practices at which the antitrust laws are aimed,"[71] Mr. Justice Douglas, delivering the opinion of the Court, cited *Brown Shoe*[72] and *Philadelphia National Bank*[73] for the proposition that section 7 of

66. *Id.*
67. *Id.*
68. *Id.*
69. United States v. Von's Grocery Co., 384 U.S. 270 (1966), where the Court disallowed a merger of two grocery chains involving 7.5 percent of the retail grocery business in the city of Los Angeles.
70. 329 F.2d 623, 626 (1964).
71. 380 U.S. 592, 594 (1965).
72. Brown Shoe Co. v. United States, 320 U.S. 294 (1962).
73. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

the Clayton Act is concerned "with probabilities, not certainties," and declared that "reciprocity in trading as a result of an acquisition violates section 7 if the probability of a lessening of competition is shown,"[74] He stated further that "the 'mere *possibilty*' of the prohibited restraint is not enough."[75]

On the face of it, the Supreme Court did not accept the Commission's position that it was sufficient that the merger resulted in a market structure which gave Consolidated the power to use reciprocity tactics in the onion and garlic industries. Thus, doctrinally at least, the Court was attempting to stay within the confines of section 7—a *probability* that competition will be substantially lessened. However, a closer examination of the decision, given the facts of this case, raises some troubling questions regarding the status of section 7 in the Supreme Court.

Mr. Justice Douglas considered that there was substantial post-acquisition evidence here which confirmed the Commission's finding of a probable, substantial lessening of competition as a result of the merger. He relied mainly on the alleged fact that Basic's product was superior to Gentry's (which is not supported by the evidence) and yet Gentry, in a rapidly expanding market, was able to increase its share of onion sales by seven percent and to hold its losses in garlic to a twelve percent decrease. But the bulk of the evidence is fully consistant with Gentry's increased onion market share for reasons totally divorced from reciprocity. Gentry was competitive in price, quality, and service, the traditional selling tools in the food industry; a small producer left the industry; Gentry developed a new processing method, greatly improving its product; the industry was expanding rapidly due to the increasing consumer demand for dehydrated foods using onion and garlic (*e.g.*, dried soups and Italian foods) and processors desired a second source of supply for their increased requirements. Further, if it was reciprocity working to increase Gentry's onion market share, it is difficult to know why it was not working as well in the garlic field, since both products are made the same way, marketed the same manner, and used in similar ways by the same customers. The Court chose to answer this query by agreeing with the Commission that Gentry's share of garlic sales may have fallen still farther had it not been for the influence of reciprocal buying.[76]

Words such as "probable" and "substantial," by themselves, are meaningless as tests or standards of legality. It is only when they are used by the Court in the context of a particular fact situation that we can attempt to attach some substantive significance to them. Both terms signify a matter of degree—"probable" lies somewhere between "possible" and "certain," and "substantial" between "some" and "all." Thus, the question is "where along the spectrum do we find the Supreme Court?" And the answer, suggested by a reading of the record in this case, is "Very near the low end."

74. FTC v. Consolidated Foods Corp., 380 U.S. 592, 595 (1965).
75. *Id.* at 598.
76. *Id.*

To show that the effect of the threatened reciprocity was substantial, it was noted that firms which both supplied Consolidated and bought from Gentry constituted twenty-five percent of the onion and garlic markes and, therefore, approximately one-fourth of the available market stood to be influenced by the possibility that Consolidated would withdraw patronage unless Gentry was in turn patronized. But this figure tells us nothing without further proof that Consolidated had substantial power as a purchaser of food products relative to the market power of its suppliers (the food processors). Without a showing that Consolidated did in fact possess leverage over a substantial segment of its suppliers, there is no basis for saying that reciprocity would probably, substantially lessen competition in one-fourth of the available market. The important consideration, regarding Consolidated's ability, or lack of it, to coerce or induce food processors to buy from Gentry, is market power in the food industry, not just in the small dried onion and garlic sub-industries. The evidence here falls short of showing that Consolidated had the power to coerce a significant segment of the purchasers who accounted for a substantial share of the onion and garlic markets. On the contrary, it adequately shows that such power was completely lacking and, thus, that the merger was not likely to have any substantial effect on competition. There was evidence, backed by logic, that Consolidated could not "pressure" national suppliers with widely accepted brand names to purchase their raw materials from a particular supplier. Consolidated's purchases from a national packer amounted to a very minimal percentage of the latter's total sales,[77] making the national brands much more important to Consolidated than vice versa. Better than eighty percent of Consolidated's purchases came from this type of supplier. Further, the record shows that, for various business reasons, even the private label packers were not susceptible to reciprocity pressures.

It was admitted by Consolidated that reciprocity was tried on occasion, but the evidence shows than any results realized by the such attempts were strictly "de minimis" at best. In this connection, Consolidated called witnesses from approximately twenty-five representative Gentry customers who unequivocally denied that their sales to Consolidated had any connection with their purchases from Gentry. They testified in detail and repeatedly to very real reasons why reciprocity cannot be an effective market force in the food industry. It is difficult to understand why this testimony, given under oath by knowledgeable food company officials, the only individuals who knew the reasons for their purchases, was not accepted by the Commission or the Court—unless purchasing agents, as well as trade relations men, are considered to be morally or ethically questionable in their methods of dealing.

As the evidence does not support a finding of a probable, substantial lessening of competition at all, we are forced to conclude that the Commission

77. In most cases, it was less than one percent.

and the Court were satisfied with something less because they proscribed the merger. It is apparent from their language that the Commissioners, at least, condemned the potential reciprocity made possible by the merger. It would also appear that, despite the express language used, the Supreme Court is basically in agreement with that position and will, in the future, move to block any merger resulting in a situation conducive to reciprocity.

If this analysis is correct, it means that diversification by acquisition is illegal wherever the result is potential reciprocity. In turn, this implies a general proscription of conglomerate mergers which, as previously mentioned, inherently enhance the area of potential reciprocity.[78]

That this is the present situation is lent some weight by the separate concurring opinion of Mr. Justice Stewart in the *Consolidated Foods* case. He too seemed troubled by the standards of probability and substantiality applied by the majority. He stressed that the touchstone of section 7 is the probability that competition will be lessened and implied that the evidence relied upon by the Court fell short of this mark. He said:

> The Act does not require that there be a certainty of anticompetitive effect. But that does not mean that the courts or the Commission can rely on slipshod information confusingly presented and ambiguous in its implications. The law does not require proof that competition certainly will be lessened by the merger. But the record should be clear and convincing that the requisite probability is present.
>
> . . . .
>
> The record in this case is sorely incomplete, and a reviewing court is given little guidance in determining why this merger should be voided, if reciprocity—creating mergers are not *per se* invalid.[79]

In any event, he thought that the record contained "just enough" to support invalidation of the merger, but because of evidence not referred to in the Court's opinion.[80]

The *General Dynamics—Liquid Carbonic* merger, discussed previously in connection with section one of the Sherman Act,[81] was the first section 7 reciprocity decision following the *Consolidated Foods* case. Proceeding on the basis that the point of inquiry is the time of the merger and that reciprocity is an anticompetitive practice, the Court stressed an approach consisting of "an analysis of the power created by the merger, the likelihood of its implementation, and the probable competitive consequences of the resulting foreclosure."[82] However, as all of these factors were readily apparent here, it was a comparatively

78. *See* text accompanying *supra* note 51.
79. FTC v. Consolidated Foods Corp., 380 U.S. 592, at 606 and 607 (1965).
80. He divided the food industry into large suppliers with nationally advertised brands and smaller packers who packed under Consolidated's private labels and found that Consolidated could coerce the latter group because of the absence of consumer demand for their product. *Id.* at 607.
81. *See supra* note 23 and accompanying text. *Cf.* Comment, *United States v. General Dynamics Corp.*, 42 N.Y.U.L. Rev. 733 (1967).
82. 258 F. Supp. 36, 61 (1966).

easy case and not particularly useful to our analysis of the actual standards of illegality being applied by the courts. The tremendous size and power of General Dynamics and its systematic application of a special reciprocity program to an already highly concentrated carbon dioxide industry justified the court in finding that a merger which resulted in such a program was likely to substantially lessen competition in violation of section 7.

CONCLUSION

In view of the holding in *Consolidated Foods* and the fact that all of the reciprocity cases to date have involved a merger or acquisition, it is safe to assume that the principal vehicle of attack in future reciprocity cases will be section 7 of the Clayton Act. However, if we accept the position of antitrust chief Donald F. Turner that all conglomerate mergers are not harmful to competition and that some are even procompetitive,[83] it is undesirable to hold that, because diversification increases the area of possible reciprocal dealing, mergers which result in a market structure conducive to reciprocity are "per se" illegal.

This is in no way inconsistent with a policy that reciprocity is an anticompetitive practice. Even assuming this, we must find affirmative answers to three additional questions before finding that a given merger violates section 7, which is an anti-merger, not an anti-reciprocity, provision. First, is reciprocity possible in the given market situation? Second, if so, will it probably be used? And third, will its use substantially lessen competition? All of these question can be answered as of the time of the acquisition, but if post-acquisition evidence is available no logical reason is apparent for not giving it substantial consideration. Surely evidence of actual market experience is always preferable to predictions of probable behavior.

Although a merger might create a market structure conducive to reciprocity, in that a firm's suppliers have become potential customers, it is only possible to exploit it where the acquring firm has substantial market power or leverage in relation to its suppliers. It must be economically important to its suppliers such that the latter are induced, overtly or tacitly, to exchange purchases with it. Evidence of this important ingredient was absent in the *Consolidated Foods* case.

Similarly, merely because reciprocity dealing is possible in a particular situation does not infer automatically that it will be used. Many firms do not subscribe to its practice because of the ethical stigma attached to it. Purchasing agents, in particular, don't like it because it inserts a completely alien factor

83. *See generally* Turner, *supra* note 45; Handler, *supra* note 9, at 437-38. Some of these benefits are the maintenance of a strong capital assets market, such that capital assets are controlled by those who will use them to their utmost economic advantage, thus tending to maximize society's total output of goods and services; substantial economies of scale in production, research, distribution, management, and cost of capital; the stabilization of profits, thereby minimizing the risks of business failure and bankruptcy; an avenue for industrial growth sometimes less expensive than internal expansion because existing facilities can be acquired for less than the cost of building them; invigoration of competition in an industry characterized by oligopolistic lethargy and inefficiency.

into their purchasing considerations. In general, they consider their function to be a highly specialized and important one and they take pride in their ability to drive the best bargain possible in terms of price, quality, and service. Reciprocal buying reduces their function to little more than an ordering clerk. In this connection, it should be noted also that in most large corporations, purchasing and sales are separate and autonomous departments. This means that any reciprocity contacts must necessarily occur at higher levels of managements and be filtered down through the chain of command to the relevant personnel. But busy executives with important duties of their own can't have much time to devote to those of their buyers or salesman. Top management decision-making would rarely include choosing the supplier from which the company's dried onion needs should be purchased.

In addition to the above anti-reciprocity observations, a trade relations program is costly. It requires detailed and up-to-date customer records and a significant degree of co-ordination between purchasing and sales. Some doubt that the returns justify the cost. In fact, the practice of reciprocity has been alleged to be inherently unprofitable in that it raises a company's purchasing costs by (1) weakening supplier price competition, (2) permitting less-than-average supplier performance in quality and delivery, and (3) promoting sloppy purchasing by removing the purchaser's incentive to drive the hardest bargain and thereby contribute to cutting over-all company costs.

Reciprocal dealing is also claimed to affect the sales effort: (1) Salesmen tend to become complacent and almost always neglect their reciprocal accounts because they sell them as a matter of course regardless. As a result they often fail to increase sales to present customers, generally considered to be the best prospects for new business. (2) Reciprocity tends to downgrade a company and its product by implying that it must rely on this, in lieu of price, quality and service in order to sell its product.[84]

Executives are often reluctant to engage in reciprocal arrangements because of its double-edge potential. If a firm decides to discontinue a supplier previously working on a reciprocal basis, it will find that it has also lost a customer. And once a company has gotten into the practice, experience teaches that it is very difficult to back out.[85] Accordingly, many businessmen prefer not to paint themselves into such a corner.

Also, reciprocity selling tactics can boomerang on the user. Some purchasing agents, testifying in the *Consolidated Foods* hearing, when asked if their firm's sales to Consolidated were mentioned by the Gentry salesman, exhibited the natural human resentment towards being pressured or bribed and replied that if he had, he surely would not have received any business. In a similar vein, Gentry brokers testified that some of the pre-merger Gentry's sales were

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84. *See* Ammer, *supra* note 6, at 122.
85. Handler, *supra* note 9, at 435.

to direct competitors of Consolidated and, in this respect, it was to Gentry's advantage to prevent disclosure of the acquisition as far as possible. In fact, there was evidence that Gentry lost sales as a result of its connection with Consolidated.

Finally, the most salient argument against assuming that businessmen will use reciprocity merely because of its availability is the *Consolidated Foods* decision itself. By it, the Supreme Court has added one more weapon to its section 7 arsenal—potential reciprocity. Businessmen now know that allegations of reciprocal dealing can put their merger in a vulnerable position to be struck down by a minimum of evidence in that regard. Assuming they have economic reasons, other than the hope of entering into some reciprocal arrangements with suppliers, for wanting to merge, corporate officers will tread the reciprocity-path warily in the future to avoid putting their merger in jeopardy for benefits uncertain and incidental to their primary reasons for merging.

The last issue to be resolved in a section 7-reciprocity inquiry, *i.e.*, substantiality, continues to be an elusive concept which the courts have been attempting to define for some years. Theoretically, a substantial lessening of competition appears to depend on the degree of concentration already existing in the relevant industry. The higher the level of concentration prior to the merger, the smaller the amount of the market that need be affected; and, each case must be decided in the context of its own fact situation and market structure. All that can be said at this point is that recent decisions indicate that the government's task of meeting the issue of substantiality seems to be getting easier.

In sum, the assumption that reciprocity is an anticompetitive practice and should not be permitted to obfuscate the traditional forms of competition—price, quality, and service—is only the beginning, and not the end, of a section 7 inquiry.[86]

86. For an interesting dialogue as to the validity in economic theory of coercive reciprocity and, consequently, the validity of regulating it under the anti-trust laws, *see* Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 Law & Contemp. Prob. 552, 566-80 (1965), *and* Burrus, *Tying Arrangements and Reciprocity: A Lawyer's Comment on Professor Ferguson's Analysis*, 30 Law & Contemp. Prob. 581 (1965).